IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.5397 of 2003
Date of Decision: 18.10.2006

Paramjit Singh Ahuja

…Petitioner

versus

Punjab State Financial Industrial Development Corporation Limited and others

…Respondents

CORAM:- **HON'BLE MR. JUSTICE JASBIR SINGH**
HON'BLE MR. JUSTICE PRITAM PAL

HON'BLE MR. JUSTICE VINOD K.SHARMA

Present: Shri I.S.Ratta, Advocate for the petitioner
Shri Kamal Sehgal, Advocate for
Haryana Financial Corporation
Shri Arun Walia, Advocate for PSIDC
Shri S.S.Brar, Advocate for respondent No.6

Jasbir Singh, J.

This writ petition was filed by the petitioner, on receipt of a notice under Section 29 of the State Financial Corporation Act, 1951 (in short the Act), vide which, respondent No.1 – Punjab State Industrial Development Corporation Ltd. (in short the creditor), intended to take possession of residential house of the petitioner, which was mortgaged as a security by him (by depositing original title deed), to secure the loan, disbursed by the creditor to M/s Noor Papers Ltd. – respondent No.2. (Name of respondent No.2 was deleted from array of parties vide order dated 10.1.2005).

In this writ petition, it is case of the petitioner that as he has ceased to be a Director of the Company, security furnished by him cannot be

encashed by the creditor and further that it is not open to the creditor to take over possession of the property of the petitioner and realise the same under Section 29 of the Act, as that provision can be invoked only against the industrial concern, to whom the loan was disbursed by the creditor.

When this writ petition came up for hearing before a Division Bench of this Court on 7.4.2003, after noting following contentions of counsel for the petitioner, notice of motion was issued:-

> *"Inter-alia contends that principal borrower, i.e. M/s Noor Papers Limited has not been proceeded under Section 29 of the Punjab State Financial Corporation Act, 1951 nor the new guarantors have been issued notice under Section 29 of the Act aforesaid. The petitioner, who is no more guarantor has instead been proceeded with for taking in possession of his residential house at Tarn Taran."*

After notice, written statement was filed by respondent No.1, the creditor, wherein averments made by the petitioner were controverted and it was said that he was one of the promoter Directors of the industrial concern, on whose behalf, the petitioner had stood as a guarantor/ surety for repayment of the loan and to secure the loan he had furnished his personal guarantee and also deposited original title deeds of the property, in dispute, with the creditor. It has further been said that the petitioner, of his own, voluntarily, resigned as a director of the company i.e. principal debtor. Request of the company, to release the security, furnished by the petitioner, was not accepted, as the alternative security being offered, was not acceptable to the creditor. It was further said that the security given by the petitioner was never released and further that after notice, the petitioner had handed over vacant possession of the property, in dispute, to the creditor, of

his own and had signed a note, handing over possession of the said property. It was further said that it is open to the creditor to have recourse to the provisions of Section 29 of the Act as liability of the petitioner is co-extensive with that of the principal debtor, so keeping in view the agreement dated 27.11.1996, giving his personal irrevocable continuing guarantee by the petitioner and deed of guarantee, coupled with deposit of original title deeds with the creditor, action under Section 29 of the Act is justified and it is not necessary, first to proceed against the principal debtor and then realise the amount from the surety.

When this matter came up for hearing before a Division Bench of this Court, counsel for the petitioner placed reliance upon a Division Bench judgment of the Karnataka High Court in *N.Narasimahaiah v. Karnataka State Financial Corporation, 2003(2) ISJ (Banking) 594* and also on the ratio of Full Bench judgment of Allahabad High Court in *Munnalal Gupta v. Uttar Pradesh financial Corporation and another, AIR 1975 Allahabad 416* and a Division Bench judgment of the Kerala High Court in *Joseph v. Kerala Financial Corpn., 1990 ISJ (Banking) 110*, to say that it is not open to the creditor, to proceed against the surety, by invoking the provisions of Section 29 of the Act. In the alternative, it was said that even if action under Section 29 of the Act is permissible, after taking over the possession, the property can be disposed of only by having recourse to the provisions of Section 31 of the Act or by availing remedy provided under general law i.e. by filing a civil suit.

As against this, counsel for the respondent – creditor placed reliance upon the ratio of the judgment of Orissa High Court in *Miss K.T.Sulochana Nair v. Managing Director, Orissa State Financial Corporation and others, AIR 1992 Orissa 157,* two judgments of this Court

in *Surjit Singh v. Haryana Financial Corporation and others, 1(1999) BC 86* and in *Jasbir Kaur and another v. Punjab State Industrial Development Corporation Ltd., Chandigarh and another, AIR 2002 Punjab and Haryana 74*, to contend, to the contrary.

Ratio of the judgments relied upon by counsel for the respondent- creditor is in direct conflict with the ratio of the judgments relied upon by counsel for the petitioner, as referred to above. By noticing the same and also taking note of the fact that when judgment was passed by a Division Bench of this Court in *Jasbir Kaur's case (supra)*, provision of Clause (aa) of sub-section 1 of Section 31 of the Act, was neither considered nor referred to. The Division Bench of this Court on 5.7.2006, framed the following question of law for consideration:-

> "*Whether in terms of Section 29 of the State Financial Corporation Act, 1951, the Financial Corporation could take over the possession and/ or management of the property of the surety secured in favour of the Corporation and could direct the sale or lease of the property of the surety mortgaged/ hypothecated to the Corporation?"*

It was also felt necessary that it would be appropriate to constitute a Full Bench so that the matter may be heard and the dispute be authoritatively decided in one way or the other. On request made to Hon'ble the Acting Chief Justice, this Full Bench was constituted.

Counsel for the parties heard.

Shri I.S.Ratta, Advocate, who has put in appearance on behalf of the petitioner, by referring to the provisions of Section 29 of the Act, has vehemently contended that the action under that provision is possible only against the industrial concern/ principal debtor and not against the surety.

To say so, reference was made to sub-section (1) of Section 29 of the Act, wherein it has been mentioned that when any 'industrial concern' failed to discharge its liability towards the financial corporation, under an agreement, it is open to the corporation to take over the management or possession or both of the industrial concern and also with a right, to transfer by way of lease, sale and otherwise the mortgaged and hypothecated properties, of the industrial concern, in favour of the financial corporation. To support his contention, he has argued that after taking action under Section 29(1), only the industrial concern, can be burdened with further liability towards expenses incurred by the State Financial Corporation, towards costs incurred, in managing and selling etc. of the said property. By saying so, Shri Ratta has tried to demonstrate that as the word 'surety' has nowhere been mentioned in Section 29 of the Act, it is not open to the creditor/ financial corporation to proceed against the surety and to take over possession of the mortgaged/ hypothecated property by him, in favour of the creditor. To support his contention, he has placed reliance upon ratio of the judgments in *N.Narasimahaiah's case (supra)*, *Munnalal Gupta's case (supra), Joseph's case (supra), Thressiamma Varghese v. State Financial Corporation and others, AIR 1986 Kerala 222,* and also *M/s Kaveri Meat Export Co. Ltd. Cochin v. The Kerala Financial Corporation, Thiruvananthapuram, All India Banking Law Judgments 1996(2) 321.* He prayed that question of law framed, be answered in favour of the petitioner.

Shri Kamal Sehgal, Advocate, who has put in appearance on behalf of the respondent – Corporation/ creditor stated that the provisions of Section 29 of the Act can be invoked, not only against the industrial concern, but also against the guarantor/ surety. By bifurcating the provision of sub-section 1 of Section 29, in two parts, he has stated that the former

part deals with the industrial concern only and the latter deals with the both i.e. property hypothecated/ mortgaged by the industrial concern and also by a surety. He further argued that the provisions of Section 32G of the Act are similar to the latter part of sub-section 29 of the Act and while interpreting those provisions, the Hon'ble Supreme Court in *Delhi Financial Corporation and another v. Rajiv Anand and others, (2004) 11 Supreme Court Cases 625*, has held that no doubt name of the surety is not mentioned in Section 32G of the Act, however, remedy under that Section is available to recover the amount, due to the financial corporation and as such, remedy is not restricted only against the industrial concern, it also includes the surety as well. He has further placed reliance upon ratio of the judgments in *Jasbir Kaur's case (supra)*, *Surjit Singh's case (supra), K.T.Sulochana Nair's case (supra)*, *Thressiamma Varghese's case (supra),* a Division Bench judgment of Bombay High Court in *Padma Prafulla Shirke and another v. Maharashtra State Financial Corporation, Mumbai, 2003(3) Mh.L.J. 496*, *Uttar Pradesh Financial Corporation v. M/s Garlon Polyfeb Industries and others, AIR 2001 Allahabad 286.* Further, to support his contention that it is not necessary for the creditor to proceed first against the industrial concern and then to proceed against the surety, Shri Sehgal has placed reliance upon ratio of the Full Bench of this Court in *Haryana Financial Corporation Ltd., Chandigarh v. Bags and Cartons and another, AIR 1997 Punjab and Haryana 176).*

Before we proceed further to deal with respective arguments raised by counsel for the parties, it is necessary to look into, as to what was the purpose of framing the Act and constitution of the State Financial Corporations. A reading of the objects and reasons, originally framed and subsequently amended, indicates that the Act was passed by the Parliament

with a view to encourage small and medium scale industries, by giving them financial assistance in the shape of loans etc. To safeguard interest of the State Financial Corporations, it was envisaged that the loan amount can be recovered within a period, not exceeding 20 years from the date when loan was disbursed. The Scheme of the Act clearly envisages that the State Financial Corporations, under the Act are virtually instrumentalities of the State, (refer to *U.P.Financial Corporation v. Gem Cap (India) Pvt. Ltd.and others, (1993) 2 Supreme Court Cases 299*). At the same time, these Corporations are not like ordinary banks and money lenders. The lending of amount by these corporations is with a purpose i.e. for the promotion of small and medium industries in the State. However, at the same time, it has to be kept in mind that relationship between the corporations and the borrower is that of a creditor and debtor. It cannot be visualized that after advancing the loan amount, the Corporation is supposed to forget the same and go out of the business. Loan amount advanced, has to be recovered, so that it can be disbursed to other needy industrial concerns. The Act further envisages that while realising the amount, due to the Corporation, it is supposed to proceed as per the provisions of law. In this Act, an attempt has been made to strike a balance, so far as the rights of the industrial concern to get the loan and also rights of the corporation to recover the same, is concerned.

Brief reference to the provisions of the Act is necessary to be made at this stage. Chapter I contains definitions of various terms used in this Act. Chapter II pertains to the incorporation of the State Financial Corporations, their capital and management. Chapter III deals with powers and duties of the Board. Section 25 in this Chapter mentions the business, which a Financial Corporation, may transact. Section 26 prescribes the

limit of accommodation, which can be given by the Financial Corporation to the industrial concern. Section 27 give powers to the Financial Corporations to impose conditions, while granting accommodation to any industrial concern, with a view to protect its interest and also to ensure that the loan amount disbursed by it, be put to the best use by the borrower, under these provisions, the Corporation even has the power to appoint its nominee(s), in the Board of Directors of the Company, if need be. Sections 29 to Section 32 in Chapter III contains the provisions, by invoking which, the Financial Corporation, in case of default in repayment, can recover the amount alongwith interest, disbursed by it to any industrial concern etc. When management of an industrial concern is taken over by the Financial Corporation, Section 32A gives power to it, to appoint its nominee to the Board of Directors. Sections 32B to Section 32F are not very relevant so far the present dispute is concerned. Section 32G in Chapter III envisages that recovery of amount, due to the Financial Corporation can be recovered, as arrears of land revenue. Chapter IV of the Act deals with investment of funds, accounts and audit etc. Chapter V contains the miscellaneous provisions.

Before we make a detail analysis of provisions of Sections 29, 31 and 32G of the Act, it is necessary to discuss the rights and liabilities of a guarantor/ a surety vis-à-vis the principal debtor and also qua the creditor. Section 126 of the Indian Contract Act, 1872 (in short the Contract Act) states that a contract of guarantee is a contract, to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the “surety”, the person in respect of whose default the guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”. A guarantee

may be either oral or in writing. Section 127 of the Contract Act envisages that anything done or any promise made for benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee. Section 128 of the Contract Act lays down that liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided in the contract. Chapter VIII of the Contract Act give some rights to the principal debtor and also to the surety which are mentioned in Sections 133 to 143 of the Contract Act. Except those rights and also limit of the liability, as may be mentioned in the guarantee deed, the surety is liable to compensate the creditor, in case of default committed by the principal debtor. It is not open to the surety to say that his position is different from that of the principal debtor. The only remedy(s) available to the surety is, as mentioned in Sections 133 to 143 of the Contract Act or as may be mentioned under the guarantee deed.

The provisions of Section 128 of the Contract Act came up for consideration before the Hon'ble Supreme Court in *State Bank of India v. M/s Ind/ export Regd.*, *AIR 1992 SC 1740*. To exactly understand the status of a surety, it will be useful to reproduce paragraph Nos.14 to 18 of the said judgment, which reads as under:-

> *"14. In Pollock and Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728 it is observed thus:*
>
> *"Co-extensive – Surety's liability is co-extensive with that of the principal debtor.*
>
> *A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the*

principal debtor before suing the surety, and a suit may be maintained against the surety though the principal debtor has not been sued."

15. In Chitty on Contracts, 24th Edition, Volume 2 at page 1031, paragraph 4831 it is stated as under:

"Conditions precedent to surety prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."

16. In Halsbury's Laws of England, Fourth Edition, Vol.20, paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to issue him, although solvent, unless this is expressly stipulated for."

17. In Hukumchand Insurance Co. Ltd. vs. Bank of Baroda, AIR 1977 Karnataka 204, a Division Bench of the High Court of Karnataka had an occasion to consider them question of liability of the surety vis-à-vis the principal debtor. Venkatchalia, J (as His Lordship then was) observed: (Para 12)

"The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities although arising out of the same transaction. Notwithstanding the fact that they may stem from the same

transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."

18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the Court that the principal debtor is in default."

View extracted above, was followed by a Division Bench of Allahabad High Court in the case of *M/s Garlon Polyfeb Industries and others (supra)*.

In view of established law, as referred to above, there is not even a slightest doubt that the creditor is entitled to recover the amount from the surety, in case any default is committed by the principal borrower, even without initiating proceedings against the latter. The liability of the surety is co-extensive with that of the principal borrower subject to the provisions of the Contract Act and also anything mentioned, to the contrary, in the guarantee deed.

Now to decide the present controversy, we will refer to the provisions of Sections 29, 31, 32G of the Act, which read thus:-

*"**29. Rights of Financial Corporation in case of default.-** (1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concerns, as well as the*

right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under sub-section (1) shall vest in the transferee all rights in or to the property transferred as if the transfer had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had, with respect to the original goods.

(4) Where any action has been taken against an industrial concern under the provisions of sub-section (1), all costs, charges and expenses which in the opinion of the financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under, the provisions of sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purpose of suits by or

against the concern, and shall sue and be sued in the name of the concern.

31. Special provisions for enforcement of claims by Financial Corporation.- *(1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligatins in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance under section 30 and the industrial concern fails to make such repayment, then, without prejudice to the provisions of section 29 of this Act and of Section 69 of the Transfer of Property Act, 1882 (4 of 1882) any officer of the Financial Corporation, generally or specially authorized by the Board in this behalf, may apply to the district judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely:-*

"(a) *for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or*

(aa) for enforcing the liability of any surety; or

(b) for transferring the management of the industrial concern to the Financial Corporation; or

(c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant

or equipment from the premises of the industrial concern without the permission of the Board, where such removal is apprehended.

(2) An application under sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and such other particulars as may be prescribed.

32G. Recovery of amounts due to the Financial corporation as an arrear of land revenue.- *Where any amount is due to the Financial Corporation in respect of any accommodation granted by it to any industrial concern, the Financial Corporation or any person authorized by it in writing in this behalf, may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the amount due to it, and if the State Government or such authority, as that Government may specify in this behalf, is satisfied, after following such procedure as may be prescribed, that any amount is so due, it may issue a certificate for that amount to the Collector, and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue.*

A perusal of the provisions of the Act, referred to above, indicate that these provisions deal with the rights of the Corporation to enable it, in the event of breach of an agreement or default in the repayment of loan or advance or the installments thereof by the loanee, to recover the same. Their Lordships of the Supreme Court, while interpreting the provisions of Sections 29, 31, 32 in <u>*A.P. State Financial Corporation v. M/s*</u>

GAR Re-Rolling Mills and another,(1994) 2 Supreme Court Cases 647, observed that Section 29 is a complete code in itself and the Financial Corporation is competent to invoke the provisions of Section 29 notwithstanding the provisions of Sections 31 and 32 of the Act. It was further held that the Corporation may abandon proceedings under Section 31 of the Act and initiate the proceedings under Section 29 of the Act and vice versa. Regarding scope of Section 29, it was observed thus:-

> *"9. An analysis of Section 29 of the Act reveals that where any industrial concern which is under an obligation and a liability to the Corporation under an agreement makes a default in repayment of the loan or advance or any installment thereof or otherwise commits breach of any of the terms of the agreement, the Corporation has the right to take over the management or possession or both of the defaulting industrial concern.* **It also has the right to transfer by way of lease or sale and realise the property pledged, mortgaged or hypothecated or assigned to the Corporation as security for the loan.** *Any transfer of property of the defaulter thereafter made by the Corporation shall vest in the transferee all rights in or to the property transferred by virtue of Section 29(2) of the Act. Vide Section 29(3) of the Act, the Corporation has the same rights with respect to the goods manufactured, or produced wholly or partly as it had in respect of the original goods forming part of the, security. Section 29 of the Act, therefore, deals with not only the rights of the Corporation in cases of default by the industrial concern, but also provides for a remedy to take over the management of the defaulting industrial concern with or*

without possession ***as well as*** *the right to transfer by way of lease or sale of the hypothecated property to realise its dues. Since Section 29 of the Act provides both the rights and the remedies as also the procedure for enforcement of the rights and is a complete code in itself, it is open to the Corporation to act under Section 29 of the Act to realise the dues, from the defaulting concern by following the procedure prescribed, under, Section 29 of the Act. The Corporation does not require the assistance of the court to enforce its rights while invoking the provisions of Section 29 of the Act to recover its dues from the defaulting concern.*

17. The relief available to the Corporation under Section 29 of the Act to realise its dues in the manner prescribed therein is wider in scope than the limited reliefs available to it under Section 31 of the Act and is not controlled by Section 31 of the Act. The Legislature clearly intended to preserve the rights of the Corporation under Section 29 of the Act, by expressly stating in Section 31 of the Act, that its recourse to action under that section is without prejudice to the provisions of Section 29 of the Act. What alone is not desirable or permitted by the Act is to pursue both remedies simultaneously by the Corporation and not that it cannot withdraw or abandon the proceedings initiated under Section 31 at 'any stage' and then take recourse to the provisions of Section 29 of the Act. Any interpretation which frustrates the right of the Corporation to recover its dues must be eschewed. Similarly, if in a given case, the Corporation has taken recourse to the provisions of

Section 29 of the Act, there is no bar for it without taking those proceedings to their logical conclusion to abandon them and approach the court under Section 31 of the Act to seek one or more of the reliefs available to it under that section. Where, the defaulting party fails to honour the order or decree of the court made under Section 31 of the Act, it has neither any legal nor even a moral right to object to the Corporation from taking recourse to the provisions of Section 29 of the Act only on the ground that it has obtained a proper relief under Section 31 of the Act which relief it does not wish to pursue any further. Indeed, if the order of the court issued under Section 31 of the Act has been fully complied and honoured with by the defaulting concern,, no occasion would arise for the Corporation to invoke the provisions of Section 29 of the Act. However, to hold that since the Corporation has initially taken action under Section 31 of the Act and obtained an order/ decree from the court, the Corporation is prohibited from invoking the provisions of Section 29 of the Act, notwithstanding the fact that the defaulting concern has not honoured the court's order or decree made under Section 31 of the Act, would amount to putting premium of the activities of the defaulting concern aimed at frustrating the order/ decree of the court and depriving the Corporation of recovering its legitimate dues and there rendering expression "without prejudice to .... " occurring in Section 31 otiose. Courts do not favour such a course."

A reading of the passage extracted above, clearly indicates that, while interpreting the provisions of Section 29 of the Act, the Hon'ble Supreme Court had made no distinction so far as mortgaged property of the principal debtor and that of the surety are concerned. It has been held that the corporation has the right to take over the possession, management or both of the industrial concern and also has the right to transfer by way of lease or sale and realise the property pledged mortgaged or hypothecated or assigned to the corporation as security for the loan. As such, it becomes apparently clear that there is no distinction so far as pledged property is concerned, there may be many cases where the industrial concern has no immovable property to pledge and the loan may have been sanctioned on the basis of property mortgaged by a surety and if provisions of Section 29 are interpreted in the way, in which counsel for the petitioner wants us to do, it will amount to adding words in the provisions of sub-section 1 of Section 29 of the Act, which is not permissible as per established law.

The matter can be analysed from other angle also. The provisions of sub-section 1 of Section 29 can be dissected into two parts as under:-

First Part:- *Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concerns,*

as well as

Second Part:- *the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation."*

It is argument of Shri Ratta that as in sub-section 1 of Section 29 of the Act, the reference has only been made to the industrial concern and its properties, the assets of the surety cannot be proceeded against, under that provision. To strengthen his argument, he has further stated that even in sub-section 4 of Section 29 of the Act, after taking action under sub-section 1, reference is again to the industrial concern, which can be burdened with costs and incidental charges by the Corporation. By referring to above mentioned provisions, Shri Ratta has stated that no action can be initiated against the surety under Section 29 of the Act.

We feel that the contention raised is liable to be rejected.

In between the first and second part of sub-section 1 of Section 29 of the Act, as reproduced in the preceding paragraph of this judgment, use of words '**as well as'** is very important and it is necessary to know its meaning.

As per Chambers 21st Century Dictionary, the words "**as well as"** mean "in addition to". If we read both parts of sub-section 1 of Section 29 of the Act, by looking into meaning given to these words, it becomes very clear that the right given to the Financial Corporation in the second part of this provision, is in addition to the right, given to it in first part of that section. As such, it is apparent that apart from taking action against the industrial concern, by taking over its management or possession or both, the Corporation has an independent right to transfer, by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to it. In

the second part, the legislature deliberately has not used the words "industrial concern", after the words "property pledged, mortgaged, hypothecated or assigned to the financial corporation". If contention raised by Shri Ratta is accepted then it would mean that we will be adding the words "industrial concern" at the end of sub-section 1 of Section 29 of the Act, which is not permissible. As per established law, it is not open to the Courts to read any words in a statute which are not there, especially, when, a literal reading of the provisions thereof, gives a clear meaning of intention of the legislature. Their Lordships of the Supreme Court in *Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. and others*, (1991) *2 Supreme Court Cases 637,* while dealing with a similar situation regarding interpretation of a statute, has observed thus:-

> "*It is a settled rule of interpretation of statutes that if the language and words used are plain and unambiguous, full effect must be given to them as they stand and in the garb of finding out the intention of the legislature no words should be added thereto or substracted therefrom. Likewise, it is again a settled rule of interpretation that statutory provisions should be construed in a manner which subserves the purpose of the enactment and does not defeat it and that no part thereof is rendered surplus or otiose."*

The principle, referred to above, was further elaborated by their Lordships of the Supreme Court while interpreting the provisions of Section 32G of the Act in *Delhi Financial Corporation's case (supra)*. In that case, question, as to whether provisions of Section 32G of the Act, can be invoked against the surety or not, was under consideration. The Hon'ble

Supreme Court noticed the following arguments, in favour of the proposition that these provisions can not be invoked against a surety:-

> "*It is next urged that section 32G of the Act can only apply to a principal debtor and not against a surety. In support of this submission it is pointed out that prior to amendment of section 31 in 1985, a court had taken a view that the provisions of section 31 could not be invoked against a surety or a guarantor. In support of this submission reliance was placed upon the authority of the Allahabad High Court in the case of* ***Munnalal Gupta v. Uttar Pradesh Financial Corporation, AIR 1975 All 416.*** *A Full bench of the Allahabad High Court, on a consideration of sections 29, 31 and 32 of the State Financial Corporations Act held that section 31 could not be invoked against a surety. It was submitted that in view of this decision the Legislature amended section 31 by incorporating therein sub-clause (aa). It was submitted that section 32 was amended by incorporating sub-sections (1A), (4A) and (7da) therein. It was submitted that he Legislature was specifically incorporating provisions, in sections 31 and 32, enabling financial corporations to proceed against sureties. It was submitted that by the same Amendment Act section 32G was also incorporated. It was submitted that the Legislature did not specifically provide, in section 32G, that it could be availed of against a surety. It was submitted that this clearly indicated that the intention of the Legislature was that section 32G was meant to be used only against the industrial concern who had borrowed the amounts."*

The Hon'ble Supreme Court rejected the argument, referred to above, by observing thus:-

> "*We see no substance in this submission. A plain reading of section 32G negates such an argument. Section 32G provides that "when any amount is due" to a financial corporation an application can be made to the State Government "for recovery of the amount due". The amount would be due to a financial corporation either from the industrial concern and/ or from a surety/ guarantor. If the intention was to limit the procedure under section 32G only to the principal debtor then the Legislature would necessarily have, had to use the words "amount due from the principal debtor" or "amount due from the industrial concern". The Legislature has purposely omitted to use those words. Further section 32G is being incorporated by the same Amending Act which incorporated the provisions for enforcement against a surety. The fact that it is incorporated at the time when provisions permitting proceedings against a surety are being incorporated indicates that the Legislature was aware that proceedings under section 32G could apply even against a surety. If at this time the Legislature intended that section 32G was not to apply to a surety then the Legislature would have specifically so provided. It is therefore clear that the remedy under Section 32G is available even against a surety."*

The ratio of the judgment, referred to above, goes against the petitioner in this case and will be very helpful in deciding the present controversy. In second part of Section 29 of the Act, powers have been

given to the Financial Corporation, to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Corporation. If intention of the legislature was to limit the powers of the Corporation, in latter part of sub-section 1 of Section 29 of the Act, only against the principal borrower then the legislature would have had to use the words "the property pledged, mortgaged, hypothecated or assigned to the financial corporation by the industrial concern or principal debtor" as the word "by the industrial concern or principal debtor" has not been used, it can safely be said that the legislature had made no distinction so far as the properties mortgaged/ hypothecated etc. by the principal borrower or the surety are concerned. So, it can be concluded that under Section 29 of the Act, it is open to the Corporation to Act against the properties hypothecated, mortgaged or pledged by the surety.

The opinion expressed by us finds support from a division bench judgment of a Bombay High Court in *Padma Prafulla's case (supra)*. In that case, the provisions of sub-section 29 of the Act came up for consideration. After discussing various judgments, on the subject, it was observed as under:-

> "*Thus, we hold without any hesitation and any manner of doubt that the Financial Corporation in exercise of their right conferred on it under section 29 of the Act of 1951 can proceed and take possession of the property mortgaged by the surety or guarantor and such realization cannot be said to be inconsistent with the legal provisions or contravention of law."*

To the same effect is the ratio of the judgment in *Thressiamma Varghese's case (supra)*. In that case also, the provisions of Sections 29, 31 and 32 were under consideration before a Division Bench of Kerala High

Court and it was held that under Section 29 of the Act, it is open to the financial corporation, to proceed against the properties mortgaged etc. by the surety. It will be useful to reproduce the findings given in para 14 of the judgment, referred to above:-

> *"The Legislature has taken great care to ensure speedy recovery of the loans. The scheme is provided in Sections 29 to 32 of the Act. Operation of Sec.29 is attracted whenever there is default by a borrowing industrial concern. The Corporation shall have the right (a) to take over management or possession or both of the industrial concern and (b) to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Corporation. Sec.30 empowers the Corporation to call for repayment before the agreed period. Power conferred under S.29 is of widest possible amplitude and has dual aspects. There is the power to take over management or possession of the industrial concern; there is also the power to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Corporation. There is nothing in any of the provisions of the Act indicating that only property or assets of the industrial concern can be mortgaged or hypothecated. Absence of such a provision is understandable and well-advised. To insist that every industrial concern must have sufficient assets of its own before it can approach the Corporation for accommodation is to stifle entrepreneural enthusiasm and that would adversely affect public interest.Sub-sec. (2) of Sec.25 only prohibits*

accommodation being granted unless it is sufficiently secured, inter alia, by mortgage, hypothecation, movable or immovable property or other tangible assets. The provision does not indicate that the property or the assets must belong to the industrial concern. It should be possible for the industrial concern to arrange to secure hypothecation or mortgage of assets belonging to well-wishers who are prepared to assist the concern. That is why the provision does not indicate that assets mortgaged or hypothecated must belong to the industrial concern. Sec.29 does not make any distinction between assets of the industrial concern and assets not belonging to the industrial concern but nevertheless mortgaged to the Corporation. Both kinds of assets can be proceeded against under Sec.29. It is not possible for us to read into Sec.29 a restriction to the effect that the right conferred on the Corporation thereunder is restricted to the right to proceed only against property belonging to the industrial concern and mortgaged to the Corporation. The provision would apply to property not belonging to the industrial concern but nevertheless mortgaged by the owners of the assets to the Corporation as guarantee or security."

Similarly, a Division Bench of Orissa High Court in *Miss K.T.Sulochana Nair's case (supra),* has held that "there is nothing in the provisions to indicate that the right under Section 29 of the Act is only in respect of the property of the loanee mortgaged with the corporation on the other hand all properties mortgaged with the corporation would come within the purview of the Section 29 of the Act". After that, it was held that the

corporation has a right to take possession of the property mortgaged by the guarantor.

Before a Single Bench of this Court in *Surjit Singh's case (supra)*, a similar contention, which is being raised before this Court, was canvassed that it is not open to the financial corporation, to proceed against the surety, by invoking the provisions of Section 29 of the Act. This Court, by taking note of the ratio of the Orissa High Court in *Miss K.T.Sulochana Nair's case (supra),* held that the property mortgaged by the surety would be covered by the provisions of Section 29 of the Act. Similar was the controversy before a Division Bench of this Court in *Jasbir Kaur's case (supra)*. This Court, after analyzing the provisions of Sections 29 to 31 of the Act, observed as under:-

> *"14. The basic purpose of Section 29 is to ensure a speedy recovery of the public dues. In order to achieve this objective the Corporation has been given the power to take over the industrial unit as also the property which is pledged/ mortgaged or hypothecated etc. The provision is not restricted to the property belonging to the industrial concern. Any property which has been mortgaged or pledged can also be taken over. Keeping in view the plaint language and the dominant purpose of the provision, we find no reason to give it a restricted meaning. An interpretation which may defeat the object has to be avoided.*
>
> *15. Mr.Chadha submits that Section 31 of the Act specifically deals with the property belonging to a Guarantor. It has been provided that the Corporation can enforce the liability of a surety. In view of the*

provision in Section 31, a restricted meaning should be given to the provision in Section 29.

16. *We are unable to accept this contention. Section 31 makes a provision for enforcement of claims. It is primarily procedural in nature. In any case, the power under Section 31 is "without prejudice to the provisions of Section 29 of the Act'. Thus, the power under Section 29 is available irrespective of the mechanism provided under Section 11. Thus, the contention of the counsel cannot be accepted.*

17. *Mr.Chadha has relied upon the judgment of their Lordships of the Allahabad High Court in munnalal Gupta v. Uttar Pradesh Financial Corporatio, AIR 1975 All 416 (FB). Reference has been made to the observations in paragraph 9.*

18. *On a perusal of the judgment, we find that even in this case it was held by their Lordships that 'the right given to the Corporation under Section 29 will extend to the property of the surety also." Thus, the decision does not help the petiltioners. Still further, we may notice that in Miss K.T.Sulochana Nair v. Managing Director, Orissa State Financial Corporation, AIR 1992 Orissa 157, it was inter alia observed that "there cannot be any fetter on the power of the corporation under Section 29 to take possession of the property of the surety also." A similar view had also been taken by a Division Bench of the Kerala High Court in Thressiamma Varghese v. Kerala State Financial Corporation, AIR 1986 Kerala 222.*

19. *Another fact that deserves mention is that petitioner No.1 is the wife of the promoter and Director of the company. Petitioner No.2 was one of the three promoters. Even if he is presumed to have*

withdrawn at a subsequent stage, he still remains the brother of the other two Directors. Everything is a part of the family. To exclude their property would not promote any public interest.

20. Thus, the first contention raised by the learned counsel for the petitioners is rejected. It is held that the provisions of Section 29 can be invoked by a State Financial Corporation to take over the property of the industrial concern as well as that of the surety or a Guarantor. Since the petitioners had admittedly mortgaged their property, the action of the Corporation in ordering the taking over of the two houses was absolutely legal and valid."

Though the findings have been given by the Single Bench and the Division bench of this Court on the basis of a different premises, but we are one with the same and the ratio of both the judgments, referred to above, is affirmed.

Use of words "industrial concern" in sub-section 4 of Section 29 of the Act, is also of no help to the petitioner. This provision only envisages that when action has been taken against the industrial concern under sub-section 1, all costs etc. can be recovered from the said industrial concern. It further provides as to how the money received by the corporation shall be utilized. Liability of the surety is limited to the guarantee deed. Liability towards costs etc. cannot be included in the same. Naturally, if possession of the property of the surety is also obtained under sub-section 1 of Section 29 of the Act, the liability towards costs etc. can be imposed only on the industrial concern and not against the surety, unless otherwise provided in the guarantee deed.

Shri Ratta has further, by making a reference to provisions of clause (aa) of sub-section 1 of Section 31 has made an attempt to say

that the liability of the surety can be enforced only under Section 31 and not under Section 29. In view of the findings given by us in preceding paragraphs of this judgment, the argument raised is not justified. Otherwise also, as is apparent from the reading of Section 31, it envisages that in case of default committed by the loanee/ principal borrower in repayment of the loan etc. or that the borrower fails to comply with the terms and conditions of the agreement, without prejudice to the rights of the corporation under Section 29 of the Act and Section 69 of the Transfer of Property Act, 1882 it will be open to it, to move an application to the District Judge for the following relief:-

> "(a) *for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or*
>
> *(aa) for enforcing the liability of any surety; or*
>
> *(b) for transferring the management of the industrial concern to the Financial Corporation"*

A reading of the provisions, referred to above, clearly indicates that prior to the addition of clause (aa) in Section 31, the right was available only with regard to the property mortgaged pledged hypothecated or assigned to the corporation by the industrial concern or may be by the guarantor/ the surety. There may be many cases, where surety has no property to be mortgaged and rather a personal guarantee might have been given. Before addition of clause (aa) in the year 1985 in Section 31, there was no provision to enforce the personal guarantee. It appears that with a view to give that right to the financial corporation, clause (aa) was added to the same. The remedy provided under Section 31 is in addition to the remedy provided to the financial corporation under Section 29 of the Act. It

has been so held by a Full Bench of this Court in *Haryana Financial Corporation Ltd's case (supra).* In that case also, the provisions of Sections 29 and 31 of the Act came up for consideration and it was held that the "the Parliament has advisely conferred wide powers on the Corporation. It can on its own and without invoking the jurisdiction of the Court proceed to take over the management and/ or possession of the Industrial concern under Section 29. It has also the choice to invoke the jurisdiction of the Court under Section 31 of the Act. However, the remedy under Section 31 is without prejudice to the provisions of Section 29. Thus, the Parliament has clearly preserved the right of the Corporation to proceed under Section 29 even after it has initiated proceedings under Section 31 of the Act."

Their Lordships of the Supreme Court in *A.P. State Financial Corporation's case (supra)* have also given the same finding. Rather, it was said that the corporation is at liberty to abandon the proceedings under Section 29 and go in for Section 31 and vice versa.

We are of the opinion that while deciding the dispute in *Jasbir Kaur's case (supra),* even if the Division Bench of this Court has not taken note of the provisions of clause (aa) of sub-section 1 of Section 31 of the Act, conclusion arrived at, is perfectly justified. The addition of clause (aa), as referred to above, makes no difference so far as rights of the corporation to take action, against the surety, under Section 29 of the Act are concerned.

Now we will deal with the judgments cited by counsel for the petitioner. The primary reliance has been placed upon a judgment rendered by a Division Bench of Karnataka High Court in *N.Narasimahaiah's case (supra),* wherein it was said that under Section 29 of the Act, the Corporation can neither take over possession or management of the property of the surety secured in favour of the corporation nor can direct the sale or

lease of the property of the surety mortgaged hypothecated to the corporation. To say so, it was observed that "as there is no reference made to the surety anywhere in Section 29, the right of the State Financial Corporation remains restricted only against the industrial concern and not against the surety." It was further said that in the absence of the express statutory provision, the power to take over the property of the surety without intervention of Court cannot be inferred.

The above-said decision was given by noting that in second part of sub-section 1 of Section 29, the word surety is not mentioned and by making reference to the first part, it was said that the liability can be enforced only against the industrial concern. In view of opinion expressed by us in the earlier part of the judgment, with respect, we say that the interpretation was not correct. The use of words '**as well as'** in between the first part and second part of sub-section 1 and Section 29 of the Act are very important, which was not noticed, when above mentioned judgment was rendered. Latter part gives an additional right to the corporation to proceed against anybody's property, may be the principal borrower or the surety. The Karnataka High Court, in above-mentioned judgment has further said that the liability of the surety can be enforced only under Section 31 of the Act. With respect, we say that the finding to that extent is also not justified in view of ratio of the judgment of Hon'ble Supreme Court in *A.P. State Financial Corporation's case (supra)*. The Full Bench of Allahabad High Court in *Munnalal Gupta's case (supra)* was primarily dealing with the interpretation of the provisions of Sections 31 and 32 of the Act. Provision of Section 29 came in for consideration indirectly. Even while interpreting that provision, it was said that under Section 29 of the Act, the financial corporation has a right to take over property of the surety, however, it was

further said that the right can be enforced only by taking recourse to the ordinary law contained in the Transfer of Properties Act and Code of Civil Procedure. We feel that the Full Bench of Allahabad High Court, when opining as such, has failed to consider the extent of the liability of the surety vis-à-vis the principal borrower. In earlier part of the judgment, we have held that the liability of the surety is co-extensive with that of the principal borrower and if that is so, whatever rights are available to the financial corporation, under Section 29, against the industrial concern/ principal borrower, those very rights are available to it, against the surety also and furthermore, as we have already interpreted that the second part of sub-section 1 of Section 29 gives an additional right to the corporation, to proceed against the property mortgaged, hypothecated etc. with it, without any distinction, as to by whom the said property was encumbered, in view of our finding in that regard, we are unable to concur with the latter portion of the conclusion given by the Full Bench of Allahabad High Court in *Munnalal Gupta's case (supra)*.

Counsel for the petitioner has also relied upon a Division Bench judgment of Kerala High Court in *Joseph's case (supra),* wherein similar finding was given as in *Munnalal Gupta's case (supra),* by saying that right of the corporation will extend to the property of the surety also but the said right can be enforced only by taking recourse to the proceedings contemplated under Section 31 or by instituting a regular suit. In view of finding given by us, while dealing with the ratio of *Munnalal Gupta's case (supra),* the judgment in *Joseph's case (supra),* is also of no help to the petitioner.

Counsel for the petitioner has also relied upon judgment of the Kerala High Court in *Thressiamma Varghese's case (supra)*. However, on

careful reading of the judgment, referred to above, we feel, it goes against the petitioner and rather supports the case of the respondents. As has been discussed earlier, this judgment clearly envisages that under Section 29, the proceedings can be initiated against the properties mortgaged etc. by the surety also.

On the basis of this judgment also, no relief can be given to the petitioner.

For the same reasons, the ratio of the judgment in *M/s Kaveri Meat Export's case (supra)* is of no help to the petitioner.

By way of abundant caution, we may say that Section 29 of the Act, as has been held by us in the earlier parts of the judgment, confers very wide powers on the corporation. From notice to pay the arrears, it extends to the taking over of management and even possession, with a right to transfer by sale etc. of the properties mortgaged and pledged by the industrial concern and also by the surety. In view of vast powers available with the financial corporation, it is necessary for it, to act with caution, fairly and with reasonableness. It is advisable that action under Section 29 of the Act be initiated only when it is imperative, the best interest of the corporation and also of the industrial concern be kept in mind. Furthermore, it is also held that the principle of natural justice, are in built in the provision, referred to above and it is necessary that atleast notice, before taking action against the surety, to caution him, so that he may press upon the principal borrower to repay the loan, is required to be served upon him/her.

Coclusions:

1. The State Financial Corporations/ the creditor under Section 29 of the Act, has a right to transfer by way of lease or sale and realise the property pledged mortgaged hypothecated or

assigned to the financial corporation by the industrial concern and also by the surety.

2. The liability of the surety is co-extensive with that of the principal borrower and it is not necessary for the financial corporation/ creditor to first proceed against the principal borrower and only thereafter proceed against the surety. Creditor be at liberty to proceed against the surety even in the first instance.

3. The financial corporation has a right to proceed under Section 29 or under Section 31 of the Act. It has a further right to abandon its right/remedy under Section 29 and proceed under Section 31 and vice versa.

The law point is answered in the manner above.

The Registry is directed to put up the writ petition before the Division Bench for disposal on merits.

(Jasbir Singh)
Judge

(Pritam Pal)
Judge

(Vinod K.Sharma)
Judge

October 18, 2006
gk